Supreme Court, U.S.
FILED

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No. 03-57006
D.C. No. CV-00-00321-AHS

IN THE

Supreme Court of the United States

SYNERGY STAFFING, INC. Fka
Personnel Connection, Inc.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari
To The UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Appellant was being required by the Internal Revenue Service to make weekly payroll tax deposits. Appellant designated timely, voluntary payments to these weekly payroll tax liabilities, but the IRS did not honor the designations, resulting in cascading penalties and interest. The question is:

Prior to the enactment of 26 U.S.C. §6656(e), did employers have the power to designate voluntary employee payroll tax deposits to tax periods within a tax quarter?

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Slodov v United States 436 U.S. 238,253 n.
15,98 S.Ct 1778, 1788 n. 15,56 L.Ed 2d
251 (1978)..... 4

CORPORATE DISCLOSURE STATEMENT

Plaintiff and Appellant Synergy Staffing, Inc. is a successor corporation to Personnel Connection, Inc., which was a wholly owned subsidiary of parent corporation Purcell Group, Inc. Personnel Connection, Inc. was, and Synergy Staffing, Inc. was also engaged in the business of placing temporary staffing at companies which require such services. None of these entities is a publicly held company. The following individuals hold an interest in Purcell Group, Inc.:

Joseph M. Purcell, Michael Purcell, Anthony Purcell, Jennifer Purcell and Arlene Apodaca.

STATEMENT OF JURISDICTION

The memorandum decision of the United States Court of Appeals for the Ninth Circuit (not for publication) was filed on June 10, 2005. Rehearing was denied on August 5, 2005. This Court has jurisdiction of this Petition based on 28 U.S.C. §1254(1), as this is a petition for review of a decision of the Ninth Circuit Court of Appeals.

APPLICABLE LAW

At the times material to this petition, Congress had not yet enacted 26 U.S.C. §6656(e). Thus, Appellant relies on this Court's holding in United States v. Energy Resources Co., Inc., 495 U.S. 545, 548; 110 S.Ct. 2139, 2141; 109 L.Ed.2d 580 (S.Ct. 1990), specifically the Court's statement .IRS policy permits taxpayers who "voluntarily" submit payments to the IRS to designate the tax liability to which the payment will apply.

CONCISE STATEMENT OF THE CASE

The statutory basis of subject matter jurisdiction of the District Court is its original jurisdiction of this matter pursuant to 28 USC Section 1346(a)(1), as this is an action for the recovery of payroll tax penalties claimed to have been collected without authority.

Plaintiff filed an action in the District Court for refund of penalties and interest assessed by the IRS and paid by Plaintiff as a result of the IRS's finding that Plaintiff had not timely deposited certain payroll taxes for the quarters at issue. Defendant filed its first motion for summary judgment, which Plaintiff opposed, and which was granted11 without oral argument on April 27, 2001. Plaintiff appealed from that ruling, and from the judgment dismissing the action.

The Ninth Circuit Court of Appeals reversed in part that summary judgment in favor of the Government, finding that the District Court had erred when it ruled that Plaintiff had failed to exhaust its administrative remedy on the issue of the Government's failure to apply voluntary tax payments by Plaintiff as designated by Plaintiff on the payment. This Court remanded the matter with respect to the third quarter of 1993, the last two quarters of 1995, the four quarters of 1996, the first three quarters of 1997, and the first and third quarters of 1998. Synergy Staffing v. United States Internal Revenue Service, 323 F.3d 1157 (9th Cir. 2003).

On October 14, 2003, the District Court entered its Ruling Denying Plaintiff's Motion for Summary Judgment; Order Granting Defendant's Motion for Summary Judgment, in which it granted the Government's request for summary judgment and denied that of Plaintiff. That ruling was affirmed by the Ninth Circuit, and rehearing was denied on August 5, 2005.

STATEMENT OF FACTS

In 1988, The Personnel Connection, Inc. was bought by Purcell Group, Inc. for the purpose of developing a temporary employee placement service in California, Texas and Florida.

At various times starting in 1988, Personnel Connection was untimely in depositing .trust fund. monies on behalf of its temporary employees. Plaintiff makes no claim in this case for refund or abatement of any of the penalties or interest which it paid as a result of those unfortunate delinquencies. However, where Personnel Connection was making weekly .trust fund. payments pursuant to the rules which applied to payrolls as large as it had, the weeks following a late deposit, it always designated its new, timely deposit for allocation to the pay period ending at the time

of the deposit, or the current trust fund, amount then due. Management knew that it was important to make as many timely payments as possible, because the immediate penalty for late payments was severe. However, the Internal Revenue Service consistently, and over Plaintiff's strenuous verbal and written objections, applied these payments to past due amounts, within the same tax quarter, causing the current and timely payments to be deemed late. The penalties and interest sought in this case resulted, in large part, from these illegal failures and refusals of the Internal Revenue Service to apply the payments as designated.

Based upon a very consistent custom and practice dating back to at least 1988, Appellant's payroll checks were either signed by Joseph F. Purcell or stamped with his signature, with his authorization, by Joseph M. Purcell or Debra Murray.

The District Court's error in granting the Government's summary judgment motion and in denying Plaintiff partial summary judgment on the issue of the Government's liability for a refund of penalties and interest, turns on the Court's legal analysis. That analysis concludes that, under then current law, Plaintiff's designations of voluntary tax payments did not have to be followed by the Government. That analysis is incorrect. The United States Supreme Court has set forth a clear rule that allows taxpayers to designate voluntary payments to any liability.. Appellant was applying its voluntary payments to the individual tax liabilities as established by the payment schedule required by the IRS. Appellant was permitted to so designate its voluntary payments, and the IRS was required to honor those designations.

Thus, the Ninth Circuit erred when it affirmed the judgment of the District Court, which was based on the assertion that, at the times material to this case, a tax-

payer could not designate payments to individual liabilities within a tax quarter.

ARGUMENT

The United States Supreme Court and the Ninth Circuit have, since prior to 1998 (when congress clarified this area with the enactment of 26 U.S.C. §6656(e)), held that a taxpayer may designate how a voluntary tax payment or deposit will be applied, and if she does so, the Internal Revenue Service is required to apply the payment or deposit in the manner so designated. United States v. Energy Resources Co., Inc., 495 U.S. 545, 548; 110 S.Ct. 2139, 2141; 109 L.Ed.2d 580 (S.Ct. 1990) (.IRS policy permits taxpayers who "voluntarily" submit payments to the IRS to designate the tax liability to which the payment will apply.. [Citations Omitted.]). See also Tull v. United States of America, 69 F.3d 394, 396-97 (9th Cir. 1995). (.When a taxpayer like Hatfield makes a voluntary tax payment, it can direct that the payment be applied to a particular tax liability rather than to another one. See In re Technical Knockout Graphics, Inc., 833 F.2d 797, 799 (9th Cir.1987); see also Slodov v. United States, 436 U.S. 238, 253 n. 15, 98 S.Ct. 1778, 1788 n. 15, 56 L.Ed.2d 251 (1978). The parties do not dispute that..)

The state of the law at all times relevant to this action was that a taxpayer could elect to designate a voluntary tax payment to any liability. Moreover, there is no clearer definition of a tax liability than an IRS imposed deadline to pay taxes. Since it was forced to make weekly payments, after it was late, Petitioner designated it's subsequent payments to each current liability, to avoid onerous penalties. In light of the authorities cited above, this taxpayer was permitted to do what it did, and the Government was required to follow the designations.

Instead, the government has taken the position, now endorsed by the Ninth Circuit Court of Appeals, that there were, at times material to this case, tax liabilities which the IRS could impose (i.e. weekly liabilities, as in this case) but to which a tax-payer could not designate a voluntary payment. This directly contradicts this Court's holding in Energy Resources, above.

The Ninth Circuit Court of Appeals has decided this case, which raises an important federal question, in a way that conflicts with this Court's relevant decisions in this area. Supreme Court Rule 10c.

For these reasons, as well as the injustice to the individual tax-payer in this case, Certiorari should be granted.

Dated: January 3, 2006

Andrew M. Rosenfeld
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYNERGY STAFFING, INC. Fka Personnel Connection, Inc. Plaintiff - Appellant	No. 03-57006 D.C. No. CV-00-00321-AHS Central District of California, Santa Ana
v	
UNITED STATES OF AMERICA Defendants - Appellee	JUDGMENT

Appeal from the United States District Court for the Central District of California (Santa Ana).

This cause came on to be heard on the Transcript of the Record from the United States District of California (Santa Ana) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**. Costs taxed in the amount of $252.70.

Filed and entered 06/10/05

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYNERGY STAFFING, INC. Fka Personnel Connection, Inc. Plaintiff - Appellant v	No. 03-57006 D.C. No. CV-00-00321-AHS Central District of California, Santa Ana
UNITED STATES OF AMERICA Defendants - Appellee	ORDER

Before: TROTT and W. FLETCHER, Circuit Judges, and RESTANI, *Judge

The petition for rehearing, filed July 20, 2005, is hereby DENIED.[1**]

**The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DISTRICT

CIVIL MINUTES - GENERAL

Case No.: SA CV 00 -321 AHS (MLGx) Date: October 9, 2003

Title: Synergy Staffing, Inc., etc. v United States of America

PRESENT: HON. ALICEMARIE H. STOTLER, JUDGE (IN CHAMBERS)

Ellen Matheson	Not Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT: None

PROCEEDINGS: RULING DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Procedural History and Ruling

Defendant filed a Motion for Summary Judgment on August 1, 2003. On August 25, 2003, plaintiff filed an opposition thereto. On August 4, 2003, plaintiff filed a Motion for Summary Judgment, or Alternatively for Partial Summary Judgment. The Court scheduled oral arguments on these motions for September 8, 2004.

Plaintiff's counsel did not appear at the hearing and was unavailable to answer questions. Due to plaintiff's failure to appear, the Court took the matter under

submission on September 8, 2003. On September 23, 2003, plaintiff lodged an ex parte request for the Court to consider rebuttal argument. The ex parte request on September 29, 2003.

Based on the arguments set forth in the parties' papers and the court's own research, the Court grants defendant's Motion for Summary Judgment and denies plaintiff's Motion for Summary Judgment, or alternatively for Partial Summary Judgment. The Court further grants defendant's Request for Judicial Notice and denies plaintiff's Request for Judicial Notice.

II. Facts

Plaintiff is a California corporation that places individuals with firms as temporary employees. Beginning in 1988, the government assessed payroll tax penalties against plaintiff. Plaintiff alleges in its complaint, and in the instant motions, that it is entitled to refunds for penalties assessed in a number of taxable quarters. Pursuant to the Ninth Circuit's ruling in Synergy Staffing v United States Internal Revenue Service, 323 F. 3d 1157 (9th Cir 2003), this Court considers the penalties assessed in the third quarter of 1993, the last two quarters of 1995, the four quarters of 1996, the first three quarters of 1997, and the first and third quarters of 1998.

III. Discussion

The record of this case as well as the parties' papers reflects that defendant did assess payroll tax penalties during the quarters at issue. However, plaintiff is not entitled to a refund of these penalties. The IRS penalty assessments are presumed correct and the burden fails to plaintiff to demonstrate that the penalties were assessed in error. Welch v Helvering, 290 U.S. 111, 115, 54 S. Ct. 8, 9

(1933); United States v Molitar, 337 F.2d 917, 922 (9th Cir. 1964).

Plaintiff fails to meet this burden. Treasury Regulation §31.6302-1(l) requires a taxpayer to deposit the aggregate balance die on all reportable taxes for the period in questions. Thus, in this case, plaintiff was required to deposit the aggregate amount of taxes die each taxable quarter and not merely the amounts owed at the conclusion of a pay period. Treas. Reg. §31.6302-1. The limited evidence offered by plaintiff indicates that the designations on the face of the payroll checks were marked for specific payroll periods and not the taxable quarters at issue.

Prior to 1998 and the passage of Public Law 105-206, the Tax Code did not permit plaintiff to designate payments for individual pay periods and this the .cascading. quarterly penalties in the instant case were correctly assessed. Under the post 105-206 regime, taxpayers are now entitled to designate payment to particular pay period to avoid the triggering of 'cascading' penalties for balances due. In light of the law in place at the time of the assessments in this case, and the lack of other evidence which demonstrates plaintiff's correct tax liability, plaintiff is not entitled to a refund.

Plaintiff's Request for Judicial Notice of interest rate tables posted on www.IRS.gov is denied. Plaintiff fails to provide the Court with a copy of the IRS tables and this judicial notice is inappropriate. Fed. R. Evid. 201. Defendant's Request for Judicial Notice of transcripts filed on June 12, 2000, is granted.

IV. Conclusion

Plaintiff has failed to meet its burden to demonstrate that the facts and the applicable law at the time the dispute arose entitle it to a refund of tax penalties assessed from 1993 to 1998. Plaintiff has not offered admissible evidence that shows it fully paid the balance due

for each taxable quarter at issue. Thus, Defendant's Motion for Summary Judgment and Request for Judicial Notice are granted. Plaintiff' motion for Summary Judgment, or Alternatively for Partial Summary Judgment is denied. The Court has this date modified, signed and filed defendant's Proposed Summary Judgment and Statement of Uncontroverted Facts and Conclusions of law.

The Clerk shall serve this minute order on counsel for all parties in this action. Judgment for defendant shall be entered.

MINUTES FORM 11 INITIALS OF DEPUTY CLERK 's' KGP
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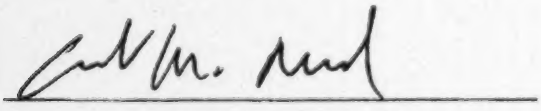
End of Appendix.

Respectfully submitted,



Andrew M. Rosenfeld

(2)

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SUPREME COURT, U.S.

No. 05-1090

In the Supreme Court of the United States

SYNERGY STAFFING, INC., FKA
PERSONNEL CONNECTION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

In the Supreme Court of the United States

No. 05-1090

SYNERGY STAFFING, INC., FKA
PERSONNEL CONNECTION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 2, 4-5) that payroll tax deposits that it made during certain taxable quarters prior to, and including, the first taxable quarter of 1998 were misapplied by the Internal Revenue Service (IRS) because they were not applied to the specific payroll periods that petitioner designated on its deposit checks. The court of appeals held that petitioner's claim lacked merit because, during all times relevant to this case, "employers did not have the power to designate employee payroll tax deposits to [specific payroll] periods within a tax quarter." *Synergy Staffing, Inc.* v. *United States*, 134 Fed. Appx. 158, 158 (9th Cir. 2005) (citing 26 U.S.C. 6656(e)). That holding is correct and does not warrant further review by this Court.

1. During the pertinent period, petitioner, a corporation that provides temporary employee placement services, was required to deposit payroll taxes into an account at an approved bank each time that it paid its employees. *Synergy Staffing, Inc.* v. *United States IRS*, 323 F.3d 1157, 1158 (9th Cir. 2003); *Synergy Staffing, Inc.* v. *United States*, No. 00-321, Statement of Uncontroverted Facts and Conclusions of Law (Facts and Conclusions of Law) at 8 (C.D. Cal. Oct. 10, 2003) (citing 26 C.F.R. 31.6302-1(b) and (c)); Pet. 2. On a quarterly basis, petitioner was required to make a payment to the IRS of the withheld taxes. 26 C.F.R. 31.6011(a)-4(a)(1); 26 C.F.R. 31.6071(a)-1(a).

Beginning in 1988, on several occasions, petitioner failed to make the payroll tax deposits each pay period as required. *Synergy Staffing*, 323 F.3d at 1158; Pet. 2. Each time that petitioner was late with a deposit, it incurred a failure-to-deposit penalty pursuant to 26 U.S.C. 6656. *Synergy Staffing, Inc.* v. *United States*, No. 00-321, Minute Entry at 2 (C.D. Cal. Oct. 9, 2003); Facts and Conclusions of Law at 8 (citing 26 U.S.C. 6656(b)(2)(1988)).

During the third taxable quarter of 1997 and the first taxable quarter of 1998,* petitioner made several payroll tax deposits. Because they were not sufficient to cover all deposits due, petitioner "sought to prevent the imposition of additional penalties and interest" under Section 6656 by placing "an instruction on [it]s check to apply

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* See Facts and Conclusions of Law at 5 ("Of the relevant payroll tax deposit checks exhibited by [petitioner] in this action, only the two checks for the third quarter of 1997 and the seven checks for the first quarter of 1998 include a reference on the face of each check to a particular payroll period within the quarterly tax return period to which the payroll tax deposit relates.").

the payment to current taxes." *Synergy Staffing*, 323 F.3d at 1158; see Pet. 2-3. If so applied, petitioner would still have owed the past-due amounts and the interest accruing on those amounts, but would have avoided new failure-to-deposit penalties by ensuring that currently due amounts were paid in full. See Pet. 3.

Then-existing law, however, did not allow employers to designate that payroll tax *deposits* be applied to a particular payroll period within a taxable quarter. *Synergy Staffing*, 134 Fed. Appx. at 158. The rule was different than that applicable to voluntary tax *payments*, which then-existing IRS policy allowed to be designated to a particular quarter. *United States* v. *Energy Res. Co.*, 495 U.S. 545, 548 (1990) (citing Rev. Rul. 79-284, 1979-2 C.B. 83. At that time, the IRS applied payroll deposits to the earliest payroll period in the taxable quarter for which amounts were due: "[D]eposits will be applied * * * against deposit liabilities in due-date order. Thus, a deposit will first be applied to satisfy any past due underdeposits within the same return period, with the oldest underdeposit being satisfied first." Rev. Proc. 90-58, 1990-2 C.B. 642. Accordingly, the IRS applied the deposits at issue here to the earliest-due payroll periods in the taxable quarter designated by petitioner, rather than to the currently due payroll period in that quarter. As a result, petitioner incurred new failure-to-deposit penalties with respect to each new payroll period.

2. In 1998, Congress decided to "[m]itigat[e] [the] failure to deposit penalty" by amending Section 6656 to "allow[] the taxpayer to designate the period to which each deposit is applied." H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 259. That new approach would alleviate the "[c]ascading penalties" which resulted from then-

existing law when "payments that would otherwise be sufficient to satisfy current liabilities are applied to satisfy earlier shortfalls." *Ibid.*

The amendment to Section 6656 was enacted on July 22, 1998, and became effective 180 days thereafter. Taxpayer Bill of Rights 3, Pub. L. No. 105-206, Tit. III, § 3304, 112 Stat 742. The amended statute, as applied to deposits due after the effective date until December 31, 2001, 112 Stat. 743, authorized their designation to a particular payroll period within a tax quarter, and, as applied to deposits due after December 31, 2001, required that they be applied to the most recent payroll period within a tax quarter, unless designated otherwise. 112 Stat. 742; see 26 U.S.C. 6656(e)(1) (Supp. V 1999). Petitioner concedes that "[a]t the times material to this petition, Congress had not yet enacted 26 U.S.C. § 6656(e)." Pet. 1.

3. Petitioner nonetheless contends (Pet. 4) that, prior to the enactment of Section 6656(e), the IRS was required to apply payroll deposits as designated. Petitioner relies on *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990), but that decision is inapposite. In *Energy Resources*, this Court considered "IRS policy [that] permits taxpayers who 'voluntarily' submit *payments to the IRS* to designate the tax liability to which the payment will apply." *Id.* at 548 (citations omitted) (emphasis added). This case, by contrast, does not involve petitioner's quarterly tax *payments*, as each such payment was applied to the tax quarter that petitioner designated. See Facts and Conclusions of Law at 3 (finding that each check "which designated the payment to a particular taxable quarter was credited to the specified quarter"). The case instead involves petitioner's tax *deposits* into the approved bank account during that tax

quarter, each of which was applied to the earliest pay period during that quarter in accordance with then-existing law. Petitioner has cited no authority to support its position that, prior to the enactment of Section 6656(e), the IRS was required to apply tax deposits in the manner requested by the taxpayer. As the statute did not then specify the process to be used in applying payroll deposits, the agency had broad authority to "fashion [its] own rules of procedure." See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) (quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965)); *Cameron* v. *United States*, 252 U.S. 450, 460-463 (1920).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PAUL D. CLEMENT
Solicitor General

MAY 2006